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81 - 6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

-against-

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Dated: New York, New York
May 28, 1982

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Questions Presented

1. Whether review should be denied because the principal question raised by petitioner was not squarely raised or passed on below and does not present a substantial federal question?

2. Whether review should be denied since resolution of the erroneous rulings below allowing anonymous prosecution and denying abstention would lead to affirmance of the judgment below without reaching the constitutional questions raised in the petition?

3. Whether review should be denied of the proposed subclass certification question since the petitioners are not members of the purported subclass and have no right to speak for it?

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CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

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-against-

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Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent State defendant Axelrod (hereinafter "State defendant") respectfully submits that a Writ of Certiorari should not be issued on the Petition of intervenors "Cristina Coe" and "Pedro Doe" ("intervenors") in this Docket.* If a Writ is issued,

* Intervenors were allowed to intervene under pseudonyms as plaintiffs and class representatives by an order of the United States District Court for the Southern District of New York (Motley, D. J.), entered August 17, 1981. The original pseudonymous plaintiffs, "Maria Moe," "Raoul Roe" and "Ricardo Roe," did not petition for certiorari.

the State defendant respectfully urges that a further Writ of Certiorari should be issued in Docket No. 81-2119 on the Cross-Petition of State defendant against intervenors and against plaintiffs "Maria Moe", "Raoul Roe" and "Ricardo Roe" ("plaintiffs") to review the judgment of the United States Court of Appeals for the Second Circuit entered January 11, 1982.* The Cross-Petition was filed as a precaution to assure that the defenses stated in Point II of this Brief in Opposition may be raised in support of the judgment.** To avoid duplication, relevant portions of the Cross-Petition are incorporated by reference (a photocopy of the Cross-Petition is attached as Exhibit "A").

State defendant's Cross-Petition was timely filed by mail May 13, 1982, thirty days after receipt of the Petition (Cross-Petition p 4). The Clerk of the Court granted State defendant an extention to May 28, 1982, to file this Brief in Opposition to the Petition.

---

* Plaintiffs were given leave to proceed under pseudonyms by an ex parte order of the United States District Court for the Southern District of New York (Lasker, D. J.), entered March 19, 1980.

** State defendant maintains that a reversal in his favor on any of the issues raised in Point II of the Brief would only offer a different ground to affirm the judgment of dismissal, rather than vary the judgment itself, and that the issues could therefore be raised as defenses to the Petition without a Cross-Petition. Stern & Gressman, Supreme Court Practice, § 6.34 at 478 (5th Ed. 1978). The Cross-Petition was filed, however, to avoid any question as to raising those issues solely as defenses.

Opinions Below

The opinions below are summarized in State defendant's Cross-Petition at pp 2-4.

Constitutional Provisions and Statutes Involved

In addition to the constitutional provisions and statutes printed at pp 4-8 of the Cross-Petition, New York Domestic Relations Law § 16 (McKinney 1977) reads as follows:

> § 16. False statements and affidavits.
>
> Any person who shall in any affidavit or statement required or provided for in this article wilfully and falsely swear in regard to any material fact as to the competency of any person for whose marriage the license in question or concerning the procuring or issuing of which such affidavit or statement may be made shall be deemed guilty of perjury and on conviction thereof shall be punished as provided by the statutes of this state.

New York Domestic Relations law § 140 (McKinney 1977) reads in relevant part as follows:

> § 140. Action for judgment declaring nullity of of void marriages or annulling voidable marriage.
>
> * * *
>
> (b) Party under age of consent. An action to annul a marriage on the ground that one or both of the parties had not attained the age of legal consent may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person as the next friend of the infant. But a marriage shall not be annulled under this subdivision at the suit of a party who for any time after he or she attained that age freely cohabited with the other party as husband or wife.
>
> * * *

New York Public Health Law § 4135 (McKinney Supp 1981) reads as follows:

§ 4135. Birth certificate; child born out of wedlock

1. (a) There shall be no specific statement on the birth certificate as to whether the child is born in wedlock or out of wedlock or as to the marital name or status of the mother.

(b) The phrase "child born out of wedlock" when used in this article, refers to a child whose father is not its mother's husband.

2. The name of the putative father of a child born out of wedlock shall not be entered on the certificate of birth prior to filing without the consent in writing of both the mother and father, duly verified, and file with the record of birth, except that with respect to a child born out of wedlock to a married woman, a determination of parentage made by a court of competent jurisdiction shall be required before the putative father's name may be entered on the birth certificate.

3. Order relating to parentage shall be held confidential by the commisssioner and shall not be released or otherwise divulged except by order of a court of competent jurisdiction.

Statement of the Case

The statutes and facts relevant to this Brief are stated in the Cross-Petition at pp 8-11.

REASONS FOR DENYING THE PETITION

POINT I

REVIEW SHOULD BE DENIED BECAUSE THE PRINCIPAL QUESTION RAISED BY INTERVENORS WAS NOT SQUARELY RAISED OR PASSED ON BELOW AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Petition raises two questions but only briefs the first. The first question is stated as follows:

> "Does New York state violate the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution by denying law abiding minors between fourteen and eighteen, even when pregnant, any opportunity to demonstrate their capacity to marry if any one parent objects to the marriage, while affording to minors who have lied or otherwise circumvented state law to marry, a full judicial hearing on capacity to marry, even over the objections of all parents?"

The question stated was not properly raised below and bears little resemblance to the New York statutory scheme. It is also, on its face and under this Court's precedents, not substantial enough for review.

Intervenors' summary judgment brief in trial court made no attempt to contrast the hearing rights of persons who comply with and of those who circumvent the provisions of Domestic Relations Law (DRL) § 15 requiring parental consent for the marriage of minors.* Intervenors' main summary judgment appeal brief likewise was silent on this point. The argument based on the alleged contrast in rights was first rasied in a single paragraph in their Reply Brief on the merits in the court below (pp 12-3), at which stage State defendant had no right or opportunity to brief the issue. Since intervenors did not allege exceptional circumstances justifying their failure to raise the claim earlier, they were not entitled to raise it at that late stage of the litigation. See

---

* State defendant argued in district court that plaintiffs' summary judgment motion and supporting brief were not properly filed on behalf of intervenors. Intervenors argued they were properly parties to the motion. For the purpose of the present petition, it does not matter whether intervenors were formally parties to plaintiffs' summary judgment papers, for neither those papers nor any others that intervenors submitted in district court clearly raised the contrasting rights as asserted here as a separate issue.

Singleton v. Wolff 428 US 106, 120-1 (1976); Fortunato v. Ford Motor Co., 464 F2d 962, 967 (2d Cir), cert den 409 US 1038 (1972); United States v. Vitasafe Corp., 352 F2d 62, 63 (2d Cir 1965); Schwartz v. S.S. Nassau, 345 F2d 465, 466 (2d Cir), cert den 382 US 919 (1965). Furthermore, neither court below mentioned the claim in any of their seven opinions on dismissal, class certification or summary judgment.

In Tennesse v. Dunlap, 426 US 312, 316 n 3 (1976), the Court refused to pass on a constitutional claim that

> "was not pleaded in respondent's complaint [and] was not considered by the District Court or the Court of Appeals...."

In the present case, the question raised was not pleaded in intervenors' complaint or summary judgment papers and was not passed on by either court below. Review should be denied because there are no exceptional circumstances requiring this Court to be the first to pass on it. See Youakim v. Miller, 425 US 231, 234 (1976); Singleton v. Wolff, supra, 428 US at 120.

In any event, the question intervenors raise significantly misstates New York law in several respects. Most importantly, they fail to acknowledge that a minor who circumvents DRL § 15 in order to marry is subject to criminal penalties for perjury. DRL § 16. Furthermore, the hearing on capacity to marry of which intervenors make much is a hearing to annul the marriage not to authorize it, may be held even if the minor did comply with DRL § 15 in obtaining parental consent, may be held over the minor's objection, and may expose the minor to prosecution for

perjury. DRL §§ 7(1), 140(b). The posited comparison between minors who would like a hearing under DRL § 15 and those subjected to annulment or criminal hearings pursuant to DRL §§ 7, 16, 140, is thus highly inaccurate.

Even assuming the comparison were valid, it presents a trivial federal question. Of course, persons obeying a law and persons being prosecuted for violating it have different rights to a hearing. Intervenors' claim would apply to any statute which prohibits or restricts the exercise of a right or privilege. There will always be those who seek, sometimes successfully, to circumvent such a statute. For example, in most states, law abiding minors cannot purchase alcoholic beverages. Many minors seek to circumvent the drinking laws by presenting false identification. But the likelihood that people will seek to evade such a law does not render the law unconstitutional or give rise to a constitutional right to a hearing to avoid the law's ambit.

Finally, even assuming that the question intervenors present brings up the underlying question of the constitutionality of a statute requiring parental consent for the marriage of a fifteen year old child, the issue does not warrant further review. As we discuss in Point II infra and more fully in Cross-Petition Point II, there are serious questions as to whether the courts below correctly interpreted the statute they upheld. Moreover, the decisions below are totally in line with this Court's precedents. In Bellotti v Baird, 443 US 622, 637 (1979), the Court outlined

the substantial arguments justifying "state deference to parental control over children...." While the Court found that parental consent was not required in all cases before a mature minor could obtain an abortion, it specifically noted, id., 443 US at 642, that:

> "[t]he present minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it."

Since it can be presumed that parents will generally act in the best interests of their children, Parham v. J.R., 442 US 584, 602 (1979), the possibility that a few parents may not do so does not require legislatures to abandon age-based parental consent requirements in favor of judicial review whenever a parent refuses a child's request. H.L. v. Matheson, 450 US 398, 425 (1981) (Stevens, J., concurring).

POINT II

REVIEW SHOULD BE DENIED BECAUSE RESOLUTION OF PRELIMINARY PROCEDURAL AND SUBSTANTIVE ISSUES WOULD LEAD TO AFFIRMANCE OF THE JUDGMENT WITHOUT REACHING THE MERITS OF THE CONSTITUTIONAL QUESTIONS RAISED BY THE PETITION.

A Writ should not issue because the Court is likely to affirm the judgment of dismissal without reaching the merits of the constitutional questions raised in the Petition. Correcting the erroneous rulings below allowing anonymous prosecution and denying abstention would provide alternative, non-constitutional grounds for affirmance. See Cross-Petition Point I, outlining

how the courts below erred in allowing plaintiffs and intervenors to proceed while concealing their identities from defendants, and Cross-Petition Point II, showing how the Second Circuit erred in requiring the district court not to abstain from deciding the constitutionality of a State statute with major, relevant ambiguities.

Continuing research has found an additional case not cited in the courts below that is of relevance on Cross-Petition Point I as incorporated by reference in this Point. The district court in Bellotti v Baird, 393 F Supp 847 (D Mass 1975), vac on other gds & rem 428 US 132 (1976), decis on rem 450 F Supp 997 (D Mass 1978), affd 443 US 622 (1979), allowed plaintiff to proceed anonymously as to defendants because revealing her name or checking her claims with her parents, classmates, etc., might infringe upon the very privacy rights the case was brought to vindicate. 393 F Supp at 849-50. The ruling in question is of limited authority since it was not reviewed on appeal, since the controlling rulings in the same decision were vacated and the case remanded, and since the factual and legal situation were quite different from the present case. Moreover, the district court's opinion does not suggest that the plaintiff's name was concealed from defendants' counsel. In fact, her standing was determined following "examination and cross-examination in camera" as to her maturity with respect to the abortion decision. 393 F Supp at 850.

In the present case, the standing issue is significantly different. Just as it takes more maturity to raise a child out-of-wedlock than to execute a valid surrender of adoption, see People ex rel. "C" v Spence-Chapin Services to Families and Children, NYLJ March 27, 1980, p 14, col 2, at col 3, so too, the decision

to marry, live together and raise a family demands far more maturity than the decision to abort an unplanned pregnancy. State defendant was entitled to seek relevant evidence on the questions of maturity and of best interests from those who had observed Ms Coe acting in a variety of roles, for instance, as neighbor, classmate, consort, mother, or daughter. Furthermore, since intervenors' claims as to whether and why Mrs. Coe refused consent are hearsay, her testimony was essential to support or rebut their allegations. Thus, the determination of intervenors' standing could not in this case, as it was in Bellotti, be made on the basis of the minor's testimony alone. Failure to provide additional evidence supporting standing would require dismissal. See Bellotti v Baird, supra, 393 F Supp at 849 n 1 (dismissing three proposed pseudonymous plaintiffs at the outset of the case "for want of proof" because "no evidence supporting their standing was introduced...").

Unlike the situation in Bellotti, the core of intervenors' claims do not turn on privacy from family and friends. Indeed, Ms Coe's pregnancy and unwed status were admittedly known to her mother and many of the other persons who might be called for evidence. Moreover, once her child was born and its birth certificate filed, her identity and unlegitimated childbirth would be known to State defendant; only her status as the particular unwed mother in this case would be uncertain.*

* Under New York Public Health Law § 4135, a birth certificate should not be marked to show the birth was out of wedlock, but in practice, under today's conditions, that conclusion is drawn from the absence of a father's name from a New York City certificate, particularly one from a public hospital.

Concealing intervenors' identities thus failed significantly to protect their privacy interests while it prevented the State defendant from preparing a full defense. Had intervenors' identities been disclosed and discovery and/or testimony been taken, the trial court might well have been able to resolve the case on the basis that the intervenors lacked standing, without reaching the constitutional issues presented. See New York City Transit Authority v Beazer, 440 US 568, 582 & n 21 (1979).

POINT III

REVIEW SHOULD NOT BE GRANTED AS TO CERTIFICATION OF A SUBCLASS OF INFANTS SINCE THERE IS NO PARTY TO THE PETITION WITH STANDING TO RAISE THE QUESTION.

Intervenors did not even brief the subclass question stated in their Petition. Moreover, in district court, Ricardo Roe an infant represented by his father, was proposed as the representative of a class of infants born or about to be born to certain minor parents. In the court below, the purported subclass Ricardo was to represent was narrowed to infants already born. Ricardo and his parents declined to seek certiorari and are now time-barred from doing so. While Cristina Coe and Pedro Doe allegedly had a child before the district court rendered judgment here, they never sought to intervene their child as a party plaintiff and class representative. Nor have they claimed in this Court or below to be members of the purported subclass. Since procedural due process and not a First Amendment claim is at issue, they

have no standing to assert the rights of members of the purported subclass. Village of Hoffman Estates v Flipside, Hoffman Estates, Inc., ___ US ___, 102 S Ct 1186, 1198 (1982) (White, J., concurring); McGowan v Maryland, 366 US 420, 429 (1961); Tileston v Ullman, 318 US 44, 46 (1943). Since no party to the Petition would have standing to seek review of the subclass issue or to assert it if a Writ were issued, review of this question should be denied.

CONCLUSION

FOR THE REASONS STATED, A WRIT OF CERTIORARI SHOULD BE DENIED. IF A WRIT IS ISSUED, A FURTHER WRIT SHOULD BE ISSUED ON THE CROSS-PETITION IN DOCKET NO. 81-2119.

Dated: New York, New York
May 28, 1982

ROBERT ABRAMS
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Attorney for Respondent Axelrod

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

ROBERT J. SCHACK
FLORENCE E. ABRAMS
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No.

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Supreme Court of the United States

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MARIA MOE, RAOUL ROE, RICARDO ROE, an infant, by his father, RAOUL ROE, CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Cross-Respondents,

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Cross-Petitioner.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: New York, New York
May 13, 1982

Exhibit "A"

Questions Presented

1. Whether review should be granted of the novel rulings below allowing plaintiffs and intervenors to conceal their identities from State defendant, thus preventing the State defendant from preparing a full defense against class certification and on the merits which might have avoided constitutional questions?

2. Whether review should be granted of the rulings below denying abstention although the statute in question contains relevant, major ambiguities under New York case law, one of which has been identified by New York's highest court and another by a trial court?

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No.

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Supreme Court of the United States

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MARIA MOE, RAOUL ROE, RICARDO ROE, an infant, by his father, RAOUL ROE, CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

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and

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Cross-Petitioner.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cross-petitioner Axelrod respectfully prays that if a Writ of Certiorari is issued in Docket No. 81-6511 on the petition of "Cristina Coe" and "Pedro Doe" (hereinafter "intervenors"),* to review the judgment of the United States Court of Appeals for the Second Circuit filed on January 11, 1982, that a further Writ of Certiorari be issued on his cross-petition in this Docket to review said judgment. The cross-petition is filed as a precaution to assure that certain defenses may be raised in support of the judgment.**

Opinions Below

In the initial judgment entered on July 17, 1980, upon an unpublished decision dated July 10, 1980 (Appendix to this cross-petition), the United States District Court for the Southern District of New York dismissed the complaint filed by plaintiffs Maria Moe and Raoul and Ricardo Roe (hereinafter "plaintiffs"). District Judge Motley agreed with State defendant's position that abstention was appropriate under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). She found that several alternative constructions might be applied by the State courts to Domestic Relations Law (DRL) § 15, the New York stat-

* Intervenors were allowed to intervene under pseudonyms as plaintiffs and class representatives by the District Court's order entered on August 17, 1981. The original pseudonymous plaintiffs, "Maria Moe," "Raoul Roe" and "Ricardo Roe," did not petition for certiorari.

** The State defendant maintains that a reversal in his favor on any of the issues raised on the cross-petition would only offer a different ground for the judgment of dismissal, rather than vary the judgment itself, and that the issues could therefore be raised as defenses to the petition without a cross-petition. Stern & Gressman, *Supreme Court Practice*, § 6.34 at 478 (5th Ed. 1978). This cross-petition is filed, however, to avoid any question as to raising these issues solely as defenses.

ute which delineates the circumstances under which parental consent to a minor's marriage is required, in avoidance of the constitutional issues plaintiffs had raised. In a judgment and decision dated December 9, 1980, and published at 635 F.2d 1045 (Appendix "D" to the petition), the United States Court of Appeals for the Second Circuit (*Kaufman*, C.J.) reversed, stating that DRL § 15 was clear and that New York courts had always interpreted the statute literally.

On remand, District Judge Motley entered an order on June 29, 1981, upon an unpublished decision of the same date (Appendix "C" to the petition), certifying a plaintiff class consisting of all New York persons who wish to marry but cannot do so because of a lack of parental consent and a defendant class of all New York town and city clerks. The district court refused, however, to certify a plaintiff subclass of children born or about to be born out of wedlock to such minors.

By an order entered on August 17, 1981, upon a decision of the same date published at 533 F. Supp. 623 (Appendix "B" to the petition), District Judge Motley granted the motion of Cristina Coe and Pedro Doe to intervene as party plaintiffs and additional class representatives and to proceed without guardians *ad litem* and under pseudonyms. The same order denied plaintiffs' motion for summary judgment and granted summary judgment in defendants' favor. Judgment was entered on August 25, 1981. The district court held that the parental consent requirement was not unconstitutional. Rather, the court found that the requirement is rationally related to the State's legitimate interests in fostering mature decisions regarding the proposed marriage of a minor, in preventing unstable marriages, and in

supporting the fundamental right of a parent to act in the best interests of his or her child free from State restraint.

By judgment and *per curiam* decision of January 11, 1982, published at 669 F.2d 67, the court below affirmed in all respects. It generally adopted the district court's reasoning.

Jurisdiction

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The judgment and opinion of the Court of Appeals for the Second Circuit were filed on January 11, 1982. State defendant received the petition of Cristina and Pedro on April 13, 1982. This cross-petition is timely filed, pursuant to Rule 19.5, within thirty days of the latter date.

Constitutional Provisions and Statutes Involved

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Domestic Relations Law § 13 (McKinney 1977) provides in relevant part:

> It shall be necessary for all persons intended to be married in New York state to obtain a marriage license . . . .

New York Domestic Relations Law § 15 (McKinney 1977) provides in relevant part:

> 2. . . . If it shall appear upon an application of the applicants as provided in this section or upon information required by the clerk that the man is under eighteen years of age and is not under sixteen years of age, or that the woman is under the age of eighteen and not under fourteen years of age, then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors or such as shall then be living, or if the parents of both are dead, then the written consent of the guardians of such minor or minors. If one of the parents has been missing and has not been seen or heard from for a period of one year preceding the time of the application for the license, although diligent inquiry has been made to learn the whereabouts of such parent, the town or city clerk may issue a license to such minor upon the sworn statement and consent of the other parent. If the marriage of the parents of such a minor has been dissolved by decree of divorce or annulment, the consent of the parent to whom the court which granted the decree has awarded custody of such minor shall be sufficient. If there is no parent or guardian of the minor or minors living to their knowledge then the town or city clerk shall require the written consent for the marriage of the person under whose care or government the minor or minors may be before a license shall be issued.

> If a parent of such minor has been adjudicated an incompetent, the town or city clerk may issue a license to such minor upon the production of a certified copy of such judgment so determining and upon the written consent of the other parent. If there is no other parent whose consent is required by this section, then, the town or city clerk shall require the written consent of the guardian of such minor or of the person under whose care or government the minor may be before a license shall be issued . . . .
>
> 3. If it shall appear upon an application for a marriage license that the woman is under the age of sixteen years and is not under fourteen years of age, the town or city clerk shall require, in addition to the consents provided in this section, the written approval and consent of a justice of the supreme court or of a judge of the family court, having jurisdiction over the town or city in which the application is made, to be attached to or endorsed upon the application, before the license is issued . . . .

New York Domestic Relations Law § 15-a (McKinney 1977) provides in relevant part:

> Any marriage in which the man is under the age of sixteen years or in which the woman is under the age of fourteen years is hereby prohibited . . . .

New York Social Services Law § 145 (McKinney 1976) provides in relevant part:

> 1. Any person who by means of a false statement or representation, or by deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to

> interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law .... Whenever a social services official has reason to believe that any person has violated any provision of this section, he shall promptly refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official who shall immediately evaluate the facts and evidence and take appropriate action.

New York Penal Law § 260.05 (McKinney 1980) provides in relevant part:

> A person is guilty of non-support of a child when, being a parent, guardian or other person legally charged with the care or custody of a child less than sixteen years old, he fails or refuses without lawful excuse to provide support for such child when he is able to do, or becomes unable to do so, when, though employable, he voluntarily terminates his employment, voluntarily reduces his earning capacity or fails to diligently seek employment.
>
> Non-support of a child is a class A misdemeanor.

New York Penal Law § 260.10 (McKinney 1980) provides in relevant part:

> A person is guilty of endangering the welfare of a child when:
>
> 1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a male child less than sixteen years old or a female child less than seventeen years old or directs or authorizes such

child to engage in an occupation involving a substantial risk of danger to his life or health; or

2. Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten and seven of the family court act.

Endangering the welfare of a child is a class A misdemeanor.

Statement of the Case

A. Statutes

Under DRL § 15, boys aged sixteen or seventeen and girls aged fourteen through seventeen who wish to marry need the consent of their competent, living, custodial parents, guardians or persons caring for them. For girls fourteen or fifteen years old, judicial approval is also required. Under DRL § 15-a, marriages by younger minors are prohibited.

B. Plaintiffs Maria Moe, Raoul Roe and Ricardo Roe

The instant case was originally brought by plaintiffs Maria Moe, Raoul Roe and Ricardo Roe. They obtained permission to proceed under pseudonyms by *ex parte* motion on March 19, 1980. Plaintiffs refused numerous requests for disclosure of their true identities. They first provided copies of the *ex parte* pseudonym motion papers, and only in redacted form, over a year later, on June 2, 1981, in reply

to State defendant's opposition to plaintiffs' motion for summary judgment.

Ms. Moe alleged that she was born on March 2, 1965, and Mr. Roe that he was born March 9, 1962. Accordingly, she was fifteen years old and he eighteen when this action commenced. Their son, Ricardo Roe, allegedly was born on August 21, 1979.

Ms. Moe and Mr. Roe asserted that they wished to marry for several reasons, including the legitimization of Ricardo Roe. They claimed they could not marry because Mrs. Moe, Maria's mother, refused to consent allegedly because she wished to obtain public assistance illegally by fraudulently claiming that Ms. Moe was still a member of her household.* Plaintiffs asserted that the parental consent requirement of DRL § 15 violated their substantive due process and equal protection rights. In the appeal on the merits below, they added a claim that the failure to provide a hearing to review a parent's refusal of consent violated their procedual due process rights.

Ms. Moe sought to represent a class of minors seeking to marry but prevented from doing so by lack of parental consent, Mr. Roe a class of persons seeking to marry such minors, and Ricardo Roe a class of infants born or about to be born to such minors. On appeal, Ricardo Roe's proposed class was modified to a subclass of infants already born. They also applied to certify a defendant class of town and city clerks.

* Only Mrs. Moe's consent was needed because she was allegedly Maria's only surviving parent and because Raoul did not need parental consent, allegedly being eighteen years old.

In trial court, plaintiffs never specified whether their requests for consent were made when Ricardo Roe was conceived, or thereafter. Based on a normal gestation period of nine months, Ricardo Roe was conceived in November, 1978, when Ms. Moe was thirteen years, nine months old. Under DRL § 15-a, the validity of which plaintiffs have never challenged, they could not have married at that time even with parental consent.

In trial court, plaintiffs also never explicitly claimed that Maria was a mature or emancipated minor. Ms. Moe never claimed to be attending school, nor did she explain how Ricardo Roe was cared for while, or if, she was at school, although she was subject to the compulsory education laws. Family Court Act (FCA) § 712(b) (29A). At the outset of the action, plaintiffs alleged that they lived independently "as a family unit" supported by Mr. Roe and occasional household employment by Ms. Moe. Subsequently, however, plaintiffs moved in with Mrs. Roe, Mr. Roe's mother. Although certain papers alleged that they paid rent to Mrs. Roe, other papers omit that claim. In none of their papers did plaintiffs indicate how much rent they paid or what proportion that was of Mrs. Roe's rent, nor did they indicate whether they maintained a separate household (in terms of living, eating, and financial arrangements) within Mrs. Roe's apartment.

Plaintiffs "have decided not to appeal here." Petition for Certiorari, p. 1 n."*".

C. Intervenors Cristina Coe and Pedro Doe

Cristina Coe and Pedro Doe moved to intervene under pseudonyms as plaintiffs and as additional repre-

sentatives of the class of minors and persons who wish to marry them. Cristina Coe allegedly was born on October 19, 1965, Pedro Doe on May 9, 1964, and their son, "Daniel Doe", in August, 1981. Assuming a normal gestation period of nine months, Daniel Doe was conceived a few weeks subsequent to Ms. Coe's fifteenth birthday.

Like the plaintiffs, Ms. Coe and Mr. Doe asserted that they wished to marry for several reasons, including the legitimization of Daniel Doe, but could not do so because Ms. Coe had been unable to obtain the requisite parental consent.* Indeed, Ms. Coe alleged that she was abandoned by Mrs. Coe, her mother, and did not even know her whereabouts. Intervenors raised the same constitutional claims as plaintiffs.

In trial court, Ms. Coe never explicitly claimed to be a mature or emancipated minor. Although subject to the compulsory education laws, she apparently did not attend school. Ms. Coe and Mr. Doe never lived together as an independent family unit. Rather, they admitted that they lived with Mr. Doe's father, stepmother, and stepsiblings and shared the household chores. They claimed to eat separately from other members of the household and to pay for their lodging out of Mr. Doe's earnings, but failed to state how much rent they paid or what proportion that was of the senior Mr. Doe's rent.

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* Only Mrs. Coe's consent was needed because she was allegedly Ms. Coe's custodial parent and because Mr. Doe's parents allegedly had consented.

Reasons for Granting the Conditional Cross-Petition

POINT I

Review should be granted of the novel rulings below that plaintiffs and intervenors could conceal their identities from the State defendant, thus preventing the State defendant from preparing a full defense as to class certification and on the merits which might have avoided constitutional questions.

Review should be granted on the cross-petition of the novel and important question of whether a plaintiff can conceal his or her identity from the defendant where the defendant objects and where the information is reasonably necessary for a defense which might resolve the case without deciding constitutional issues.

In criminal law, the right to know one's accuser is of constitutional dimension. U.S. Const. Am. VI. In civil cases as well, there is a strong public policy for "appris[ing] the parties of their opponents," *Doe* v. *Rostker*, 89 F.R.D. 158, 160 (N.D. Cal. 1981), and allowing defendants to test the *bona fides* of plaintiffs and their claims, *see Buxton* v. *Ullman*, 147 Conn. 48, 156 A.2d 508, 514 (1959), *app. dismd. sub nom. Poe* v. *Ullman*, 367 U.S. 497 (1961). Disclosure also avoids technical problems such as "potential inability to fix *res judicata*." *Doe* v. *Rostker*, *supra*, 89 F.R.D. at 162.

Concern for privacy *vis-a-vis* the public does not justify total anonymity even in "public interest" civil litigation, nor does fear of well-founded prosecution for crime

justify concealing plaintiffs' identities. *See Doe* v. *Plyler*, 458 F. Supp. 569, 572 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5 Cir. 1980), *prob. juris. noted*, 451 U.S. 968 (1981). Indeed, our research fails to show a single case in which the attorney-client privilege has been allowed to conceal the identity of a plaintiff from the defendant he has sued. *See* Annotation, "Disclosure of Name, Identity, Address, Occupation, or Business of Client as Violation of Attorney-Client Privilege", 16 A.L.R. 3d 1047, 1050-6 (1967). The only case found by the parties in the courts below where defendants did not know the plaintiffs' identities is *Roe* v. *Ingraham*, 364 F. Supp. 536, 541 n.7 (S.D.N.Y 1973), *rev'd on other gds. sub nom. Whalen* v. *Roe*, 429 U.S. 589 (1977). In *Ingraham*, it appears that the challenge was only directed to establishing that plaintiffs were real people, not to learning their names. In *Doe* v. *Poelker*, 497 F.2d 1013 (8 Cir. 1974), *on remand*, 515 F.2d 541 (8 Cir. 1975), *rev'd*, 432 U.S. 519 (1977) (*per curiam*), which the plaintiffs and intervenors also cited below as a similar example, the plaintiff's identity was initially unknown to defendants. 497 F.2d at 1065 n.2. By the time of trial her identity was disclosed to defendants and testimony was taken about her personal affairs. 515 F.2d at 542-3. Moreover, this Court held that while plaintiff's legal theories could be *rejected* as a matter of law, based on such facts as had been established or pled, there were relevant factual disputes, as to her affairs and other matters, which would have to be resolved before relief could be *granted*. 432 U.S. at 519-20 & n.1.

The rulings below of the district court, affirmed by the court of appeals, that plaintiffs and intervenors could proceed under pseudonyms, are, on the facts, consistent with

Poelker, since judgment was ultimately entered against plaintiffs as a matter of law in both cases. But the State defendant has consistently asserted that the true identities of the plaintiffs and intervenors were highly relevant at an earlier stage of the litigation. Their trial court claim was that mature minors have a constitutional right to marry without parental consent. But that claim is predicated on an assertion supported by conflicting allegations as to their maturity and hearsay factual assertions that the girls' mothers refused to consent. If Ms. Moe and Ms. Coe were not mature, then they concededly had no constitutional right to marry. If the mothers did consent, plaintiffs and intervenors could have married under DRL § 15.

Without knowledge of their true identities, the State defendant was unable to verify any of their factual allegations. For instance, the State defendant wanted to interview the parents of the plaintiffs and the intervenors as to whether and why they refused consent and to seek evidence from neighbors, employers, teachers and family as to their independence and maturity. Such facts were relevant to the standing of plaintiffs and intervenors to raise constitutional claims on their behalves or as class representatives. Their identities had to be disclosed so that State defendant could prepare a full defense on the class certification issue and on the merits of plaintiffs' summary judgment motion. The failure to disclose entitled State defendant to dismissal without reaching the merits. *See Adickes* v. *H.S. Kress & Co.*, 398 U.S. 144, 160-1 (1970).

In *H.L.* v. *Matheson*, 450 U.S. 398 (1981), the minor plaintiff challenged a statute requiring notice to her parents of a proposed abortion. The Court reviewed her plead-

ings and the trial testimony. On finding that she had failed to claim or establish maturity, the Court narrowed the constitutional question for review to what rights did she have as a non-mature minor. 450 U.S. at 405-7. In the present case, plaintiffs and intervenors conceded that only mature minors would even arguably have a right to marry without parental consent. Thus, a finding of lack of maturity would have mooted any need to reach the constitutional issues. Under the Court's prudential rules, the non-constitutional issues should have been resolved first, even though the courts below went on to uphold the statute's constitutionality. *See New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582 & n.21 (1979).

Allowing plaintiffs to proceed under pseudonyms without disclosing their identities clashed with strong public policy. It presents a novel issue, arguably at odds with this Court's rulings in analogous cases. Resolution of the question in favor of State defendant may allow the Court here, and other courts in future pseudonymous actions, to determine the proceedings without unnecessarily deciding constitutional questions. Accordingly, review should be granted.

POINT II

Review should be granted of the rulings below denying abstention because the statute in question contains relevant, major ambiguities under New York case law, one of which has been identified by New York's highest court and another by a trial court.

The New York Court of Appeals has found DRL § 15 ambiguous, noting that it is not clear whether a non-parent in whose custody a parent leaves his or her child may qualify as a "guardian" for purposes of consenting to marriage, even in the absence of a court appointment. *Matter of Bennett* v. *Jeffreys*, 40 N.Y.2d 543, 551 (1976). *Cf.* Education Law § 3212 (McKinney 1981). Assuming *arguendo* that Mrs. Coe did not simply desert her daughter in violation of the criminal law, see pp. 7-8, *supra*, then the persons in whose care Ms. Coe was left possibly may be able to consent to her marriage under the statute. Accordingly, abstention was proper under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941).

There is also an ambiguity under DRL § 15 as to when a court may appoint a guardian. On the one hand, the statute has been read to bar appointment of a guardian who will consent to the child's marriage if the parents of an infant refuse. 1973 Op. Atty. Gen. 144. On the other hand, a distinguished member of the Surrogate's Court has held that DRL § 15 would allow the court to grant letters of guardianship for the purpose of consenting to marriage if the parents are not available and the judge is satisfied that the infant's best interests will be promoted thereby. *Matter of Rivera*, 109 Misc. 2d 501, 502 (Bronx

Surr. 1981); *Matter of Rugovac*, 77 Misc. 2d 659, 661 (Bronx Surr. 1974). But no New York court has squarely decided the question in a case granting permission to marry. In the present case, Mrs. Moe is said to be available, but Mrs. Coe's whereabouts are unknown. If *Rugovac* and *Rivera* are correct, it would seem that a guardian could be sought to consent to Cristina's marriage. The district court's holding that the Second Circuit's decision with respect to Ms. Moe barred *Pullman* abstention with respect to Ms. Coe, 533 F. Supp. at 626-7 (S.D.N.Y 1981), ignored the factual difference in the circumstances to which the statute was being applied.

Moreover, the first court of appeals panel committed a serious error in refusing to acknowledge the tenability of three alternative constructions of DRL § 15. 635 F.2d at 1048. As the district court had recognized, those readings mandated *Pullman* abstention since they would have deferred construction of an ambiguous statute to the State courts and avoided the need to decide the constitutional issues.

First, it is not clear whether the parent's denial of consent under DRL § 15(2) can be arbitrary or if it must be in the best interests of the child, as must be the grant of consent under DRL § 15(3). The court below held that the best interests standard could not be read in since child custody was not involved and the statute did not mention best interests. 635 F.2d at 1049. But, in fact, the Surrogate in *Rugovac* and *Rivera* held and the Court of Appeals in *Bennett* implied that best interests analysis is applicable. Furthermore, custody *was* involved, for marriage has traditionally involved a change in child custody, once a prop-

erty or chattel transfer from parent or guardian to spouse, now a release from parental custody to self-determination. *See* Katz, "Foster Parents Versus Agencies: A Case Study in the Judicial Application of the 'Best Interests of the Child Doctrine' ", 65 Mich. L. Rev. 145, 151 (1966). Moreover, the best interests standard has been applied where child custody is not involved and where the statute does not refer to best interests. *E.g., Skagen* v. *New York City Employees' Retirement System*, 108 Misc. 2d 448, 497 (N.Y. Co. Sup. 1981); *Matter of Jean C.*, N.Y.L.J. Nov. 25, 1980, p. 13, col. 2 (Queens Fam.), *aff'd*, —— A.D. 2d ——, 447 N.Y.S. 2d 524, N.Y.L.J. Feb. 25, 1982, p. 14, col. 6 (2d. Dep't).

Second, the court below rejected the possibility that the New York courts might read a mature or emancipated minor exception into DRL § 15 on the grounds that children cannot unilaterally emancipate themselves in New York, that New York does not recognize emancipation for youths under sixteen years old, and that emancipation generally applies only where matters of public health and safety are involved. 635 F.2d at 1049. In fact, the New York courts are divided as to whether minors can unilaterally emancipate themselves. *See* cases cited in "Recommendations of the Law Revision Commission to the 1980 Legislature Relating to Support Obligations as Affected by the Independence of Children and by Unconstitutional Sex Distinctions", *1980 McKinney Sess. L.* 1614, 1616-7. Furthermore, it is arguable that the acts of Mrs. Moe and Mrs. Coe were intended to emancipate their children. Moreover, New York courts have afforded children of fifteen adult treatment without a statute. *E.g., Matter of*

Tameeka Charlene W., N.Y.L.J. Sept. 8, 1981, p. 14, col. 6 (Bronx Surr.); *Matter of Rogers*, 36 Misc. 2d 680 (Schuyler Fam. 1962). Finally, the marriage of females of child-bearing age is a public health concern. *Cf., Michael M. v. Superior Court of Sonoma County*, 540 U.S. 464 (1981).

Third, it is arguable that under the circumstances of these cases, a requirement of reasonableness would be read into DRL § 15. The New York Court of Appeals has held that the State's courts will not allow themselves to be used for the furtherance of crime, *Carr v. Hoy*, 2 N.Y.2d 185, 188 (1957), and will refuse to enforce a statute where to do so would permit the commission of a crime affecting the welfare of a child, *Matter of Jacqueline F.*, 47 N.Y.2d 215, 220 (1979). Thus, when enforcement of a statute would further a crime affecting a minor, whether or not the underlying statute is clear, the New York courts may refuse to enforce it. Specifically, in the present case, Ms. Moe's mother allegedly denied her consent to marry in order to continue to collect public assistance for the plaintiff although she had left Mrs. Moe's household. Under New York Social Services Law § 145, collecting or abetting another to collect public assistance in that manner is a crime. Likewise, Mrs. Coe has allegedly failed to insure support, care, and reasonable diligence in supervision for her daughter. Non-support and endangering the welfare of a minor are also crimes. Penal Law §§ 260.05-.10. In order to prosecute these crimes, intent would have to be proven by, in part, reviewing the reasonableness of their acts for withholding consent. Not reviewing the reasons would effectively bar prosecution.

The court below cited *Berger v. Adornato*, 76 Misc. 2d 122 (Onondaga Co. Sup. 1973), in holding that a parent's reasons for withholding consent to marriage were beyond

the scrutiny of New York courts. 635 F.2d at 1048. But the *Berger* court did in fact scrutinize the parents' reasons, just as the *Rugovac* court scrutinized the reasons of the proposed parent-substitute.

Moreover, none of the cases declining to second guess a parent's denial of consent have involved allegations of crime by the parent affecting the child's welfare. Significantly, an improper grant of consent has been found to be a crime and the parent's reasons reviewable. *People* v. *Benn*, 87 Misc. 2d 139, 142-4 (Kings Co. Crim. 1976). Under the circumstances alleged in this case, the New York courts might well decline to become *in particeps crimens*, *cf.*, *Olmstead* v. *United States*, 277 U.S. 438, 471, 484-5 (1928) (*Brandeis*, J., dissenting), and read in a requirement of reasonableness.

Conclusion

For the reasons stated, if a Writ of Certiorari issues on the petition in Docket No. 81-6511, a Writ should issue on this conditional cross-petition.

Dated: New York, New York
May 13, 1982

Respectfully submitted,

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